No. 13,031

United States Court of Appeals
For the Ninth Circuit

SAM ZALL, an individual doing business as Sam Zall Milling Company,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SAM ZALL, an individual doing business as Sam Zall Milling Co.,
Respondent.

BRIEF IN SUPPORT OF PETITION OF PETITIONER SAM ZALL THAT THE DECISION AND ORDER IN CASE NO. 20-CA-503 OF THE NATIONAL LABOR RELATIONS BOARD BE SET ASIDE.

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OPENING STATEMENT.

In this matter there are before the Honorable Court under the one number, two proceedings, that of Sam Zall, an individual doing business as Sam Zall Mill-

ing Co. as petitioner, against the National Labor Relations Board as respondent, in which the petitioner therein prays that the Decision and Order in case No. 20-CA-503 of the National Labor Relations Board be set aside and that enforcement thereof be stayed pending the determination of said petition, and that of the National Labor Relations Board wherein the Board is petitioner and Sam Zall is respondent for the enforcement of an order of the Board heretofore made.

In order to avoid confusion between the two petitioners we will characterize the petitioner Sam Zall as the "Employer".

JURISDICTIONAL STATEMENT AND OF PROCEEDINGS HAD.

Upon a charge and amended charge filed by the American Federation of Grain Millers and International Union, the General Counsel of the National Labor Relations Board in the name of the Board caused the Regional Director of the Twentieth Region at San Francisco to issue a complaint (Tr. p. 3) against the Employer alleging that he had engaged and was continuing to engage in unfair labor practices affecting commerce within the meaning of section 8 (a) (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Statutes 449 (29 U.S.C.A. 141 et seq.).

After a hearing had, the Intermediate Report and Recommended Order of the Field Examiner was made, adverse to the Employer (Tr. p. 10, et seq.).

Exceptions thereto were duly filed (Tr. p. 54) and eventually the National Labor Relations Board by its Decision and Order (Tr. p. 39), (The Honorable Abe Murdock dissenting) affirmed the Recommended Order.

THE ISSUES RAISED.

The issues raised on this appeal are the following:

(1) Whether the Employer is engaged in interstate commerce or in business activities which would have a pronounced effect on commerce.

(2) Whether the Employer has refused to bargain with the Union in the absence of a clear-cut demand for recognition and definite information that the Union was authorized by a majority of the employees to bargain on their behalf.

SPECIFICATIONS OF ERROR.

It is respectfully submitted the National Labor Relations Board erred:

(1) In finding the Employer to be engaged in interstate commerce or in such business activities which would have a pronounced effect on commerce.

(2) In requiring the Employer to cease and desist from refusing to bargain collectively with the Union as the exclusive representative of his production and maintenance employees and from giving effect to an employment contract between the employees and the Employer.

STATEMENT OF THE FACTS IN SUPPORT OF FIRST ASSIGNMENT OF ERROR.

The first assignment of error is that the Employer is not engaged in interstate commerce nor in business activities which would have a pronounced effect on commerce.

The Employer, amongst other things, manufactures chicken feed. None of this chicken feed is shipped outside the State of California. Employer's single largest buyer of this chicken feed is the Vantress Hatchery and Breeding Farms of Marysville, which itself is not subject to the jurisdiction of the National Labor Relations Act (Tr. p. 67). Purchases by the Employer of the ingredients of this chicken feed are made entirely within the State of California (Tr. p. 161).

It was stipulated that feed purchased from the Employer by the Vantress Hatchery is fed only to its breeding stock, not to baby chicks; that the breeding stock is not shipped out of the state; and that the out of state shipments consist principally of hatching eggs; shipments of chickens are rare and represent a minor percentage of total shipments of the Vantress enterprise (Tr. p. 14).

The Employer testified that he had been in the feed business for roughly twenty years; that he has the degree of M.S. received at the University of California at Davis, where he had extensive courses in poultry husbandry. He graduated in 1934. He further testified as follows:

"Q. Have you in your feed business had opportunity and contacts with poultry producers throughout this area that you deal with now?

A. Yes.

Q. With your educational background and with your practical background will you tell me this: What effect, if any, does the feeding of this feed by Vantress Brothers to their stock have to do with the production of eggs?

A. State that again.

Q. Your feed is fed to Vantress breeding stock, is it not?

A. Yes.

Q. What effect does the feeding of your feed to the stock have on the egg production of the hens?

A. Well it merely increases the layability or production of the hen.

Q. If you were to turn that breeding stock loose on the range out here in the foothills, letting them scratch for natural feed and grain and bugs and insects and one thing and another, would they still lay eggs?

A. Yes, they would.

Q. And would they still be Vantress chicken eggs?

A. If they owned the chickens, yes.

Q. So the only effect then you say on the proclivity of the hen is on her layability?

A. That's right." (Tr. p. 151 to p. 163.)

ARGUMENT IN SUPPORT OF FIRST SPECIFICATION OF ERROR.

Under this specification we have a situation where under principles of genetics the actual process of the laying of the egg is not affected—the layability of the hen is merely increased. The chicken feed never directly or indirectly reaches the eggs, which are the products shipped in interstate commerce and serves only to increase the inherent laying power of the hen.

So far as we are able to determine we believe this to be a case of first impression.

In the Field Examiner's Intermediate Report he relied on *McComb v. Super A Fertilizer Works, Inc.,* 155 Fed. (2d) 824; *Roland Electrical Company v. Walling,* 326 U.S. 657, and *Hollow Tree Lumber Company,* 91 N.L.R.B. 113. We submit the cases cited are distinguishable in fact from the case at bar. In the *McComb* case the product evidently was applied to the crop; in the *Roland* case the employees worked on electrical equipment which was itself in interstate commerce and in the *Hollow Tree* case lumber was processed into other products which went into interstate commerce.

It is respectfully submitted under the peculiar circumstances of the case that the operations of the employer, he not being actually physically engaged in interstate commerce, are not such as would have a pronounced or any effect on commerce.

STATEMENT OF THE FACTS IN SUPPORT OF SECOND SPECIFICATION OF ERROR.

The second specification of error is that the Board erred in requiring the Employer to cease and desist from refusing to collectively bargain and affirmatively requiring him to bargain with the Union as the representative of his employees in the unit.

The Employer is a small operator. At most he does not employ over eight or nine employees. He had no legal advice during the inception of the matter until it progressed to the point where a complaint issued.

The Intermediate Report of the Field Examiner quite fairly states the facts. It reads in part as follows:

> "On or about September 26, 1950, having secured an authorization card from Stovall (an employee), Gamble and Hannifin called upon the Respondent at the plant. Zall was advised that the Union planned to organize his employees. The testimony with respect to the conversation that ensued is not in conflict on material matters. Gamble's detailed version of it, which I credit, reads as follows:
>
> > 'He said that his plant was like a big family and that whenever he had any trouble in the plant why he went out and adjusted them and he said that he was a man of few words and he laid his cards on the table and says, "I don't want a union here and my people do not need a union." And I stated to him that I could appreciate his position, now not knowing too much about the principles and policies of the

organization, but after we had got better acquainted, why he would be more satisfied. And he says, "I have stated my position, we do not need a Union in this plant." ' (Tr. p. 24.)

"Mr. Zall testified:

'My first knowledge that Mr. Gamble or Mr. Hannifin were in my premises was on September 26, 1950. They came into the office and introduced themselves and brought up the subject of a possible contract between me and themselves as representing the men, and words to that effect, and I told them it was a one man business and that being a one man small business that we had gotten along fine without any union representation, that we were getting along fine and that I personally was not interested in having a union contract negotiated for (Tr. pp. 155 to 156).

'They gave me what they called a master contract to look over. I told them that as far as I was concerned personally, that I didn't particularly need a union to negotiate with.

'On the second or third of October, they were back again. I had a conversation out on the sidewalk with them. Mr. Gamble and Mr. Hannifin stated that they would like to negotiate, and I told them I wasn't interested in negotiating, and then they said, I believe, that in that case we would have to have an election, and I said—which was all new to me, I didn't know what they particularly meant by that, and he explained to me that if they had authorization cards from thirty per cent of the men, *that they could file with the NLRB for an election, that if they won 50% of the votes that they*

would then be the bargaining agent for the men. They were just getting ready to leave, almost in their car when he explained that to me, and I said, "Well go ahead and file for your election."

'I asked him when he told me—he then told me—I then asked him "Well, do you have 30% of the votes, authorization votes in this establishment?" and he said, "Yes". And I said, "Well, may I see the cards, or will you tell me the names of those who authorized you to say that?" And he said, "No", he wouldn't. I don't know the exact words he used but he said no, he wouldn't. That was it. He wouldn't tell me or show me who they were.

'Q. Well, on that day, when earlier in the conversation you didn't need a union or words to that effect, *at that time you didn't even ask his verification that he had 30% authorization?*

'A. *I didn't have the slightest inkling that he was prepared to negotiate.*' (Tr. pp. 156 to 158.)" (Italics ours.)

Again quoting from the Intermediate Report:

"On October 3, 1950, after having secured designation cards from a majority of the Respondent's employees, Gamble and Hanifin returned to the plant; they met the Respondent outside the plant office and held a conversation with him on the sidewalk before the front entrance. Gamble's testimony, which I credit, with respect to this conversation reads as follows:

'I asked Mr. Zall if he had read and studied the contract, he said, "Yes", he had; I asked

him what he thought of it and he said he thought it was a very good contract, but that was one man's opinion. *I asked him if he would consent to a joint election which was customary between unions and employers for the purpose of recognition of the union as his employees' representative.* He stated that he had already previously stated his position that he did not want a Union in the plant. *I asked him if he would consent to an election if we had over thirty per cent* * * * thirty per cent of the membership signed up. Signed up means the authorization cards. He says, "Have you got them?" I said, "Yes". He said, "Let me see them". I said, "Oh, no." I said, "That is for the Board and if the Board decides to let you see the authorization cards, that will be another matter." He stated again that he had previously made himself known on this matter and at that time we should leave and he went into the plant and we left the premises.' "

Gamble also testified, credibly, that Zall, in the course of the conversation, had invited him to go ahead and petition for an election, but stated that his good relations with the Union would cease when it had its election. *The Union, in fact, did file a petition for an election on October 4, 1950; the petition was withdrawn, however, on the 16th of the month* (Tr. pp. 25 to 26).

There were seven employees within the unit. Five signed so-called "Authorization and Application for Membership Cards". The testimony of the organizer was that two additional employees also signed the

cards but he did not see fit to bring the cards in before the Trial Examiner. The two employees were not called as witnesses.

The General Counsel called only three of the five. Two of the three testified that they understood that their signatures were for the limited purpose of permitting the Union to file a petition and bring about an election (Mathews Tr. p. 141). The other has not been made a part of the transcript.

ARGUMENT IN SUPPORT OF SECOND SPECIFICATION OF ERROR.

As the facts show, the Employer is a small operator. The very nature of his operations and the fact that they were limited to sales inside the State of California would indicate to him as a layman that he was not subject to the provisions of the Labor Management Relations Act. When the organizers called on him there never was any suggestion by either that he was engaged in interstate commerce. The question never arose. If in fact by reason of these operations and the "Dollar Formula" adopted by the Board, he was under its jurisdiction (which hypothesis we earnestly deny) he certainly did not know it, either in fact or in law and such violations of the Act as the Board has found occurred were certainly innocently done.

The serious question here involved is whether the Employer was ever faced with a specific request to recognize and bargain with the union. A clear and

unequivocal demand for recognition is of course the true basis for a claim of violation.

In the *Solomon Company,* 84 N.L.R.B. 26 and in *National Labor Relations Board v. Valley Broadcasting Company,* 189 Fed. (2d) 582 (Sixth Circuit, June 1, 1951) it was held that in the absence of a clear cut demand presented to the employer to bargain, the petition of the Board to enforce an order requiring the employer to desist from refusing to bargain would be dismissed. The latter case is so strikingly similar on the facts that we have taken the liberty of making a rather full digest of it which is attached hereto, marked Appendix "A".

On September 26, 1950, when Gamble and Hanifin walked into the Employer's plant they were utter strangers to him. He had never seen them before. *They then had only one employee, Stovall signed up.* There was no claim made at that time that the Union represented the employees. As a matter of fact, as the Examiner puts it, "Zall was advised that the Union planned to organize his employees." He might have been "effectively put upon notice with respect to the Union's desire to negotiate as the representative of his employees" but not even the Union contends that on that day it had any authority except from one employee. The only fair intendment from the conversation quoted is that the Union was intending to organize the plant if it could and if it could it would probably propose a contract somewhat similar to the "Master Agreement".

On October 3, 1950, the two organizers returned and other than a passing reference to the contract the substance of the conversation went to the question of an election and the alleged fact that they had the required 30% for that purpose. They asked the Employer if he would consent to the election (though why that would be necessary, if they had the necessary consents, is hard to see) and when he asked them to see the consents he was refused and brushed off with the statement, "That is for the Board and if the Board decides to let you see the Authorization Cards that will be another matter." There was not a single indication any place in the conversation that the Union had the required majority or that based on any claim of such majority they were demanding, requesting or requiring that the Employer should bargain with them.

There is nothing in the record as we view it, which can justify any conclusion that the Employer intended to refuse to negotiate if negotiations were ever presented to him. He was certainly entitled to state his personal opinion that he didn't want a Union in his plant and that his people did not need a Union. That is all he ever said. He did not say, directly or indirectly, by implication or otherwise, that he would never negotiate with an organization representing the requisite percentage of his employees.

While the Examiner found that there was a sufficient demand in which he is sustained by the Board, nonetheless he did have a doubt in his mind as to

compliance with the requirement. In his Intermediate Report he says:

> "Ordinarily, it is true, an employer is not required to recognize and bargain with a Union until he receives a request for such recognition or the initiation of negotiations from the labor organization. (NLRB v. Columbian Enameling and Stamping Company, 306 U. S. 292.) *And the record, in its present form, does give rise to some doubt with respect to the Union's compliance with this requirement.* It did not, in conformity with its usual practice, dispatch a letter to the employer advising him of its status as a majority representative and requesting a conference for the purpose of initiating negotiations." (Tr. p. 29.)

Under the record as it stands, we submit that the Employer under the circumstances was not faced with a demand to bargain and consequently could not refuse to accede to the request.

We realize that the motives under which an employee signs an authorization card may be of no interest in determining the question of representation. However, in this particular case the testimony of the employees is such that it certainly supports the conclusion that when the organizers called on the Employer they had nothing in mind but an election. The testimony shows that five of the employees signed the authorization cards. The organizer claimed two additional employees' authorizations which were not introduced into evidence, nor were the employees called

as witnesses. The General Counsel called only three of the five who had signed the cards. Two of the three testified that they understood their signatures were for the limited purpose of permitting the union to file a petition and bring about an election.

We submit that was the purpose the organizers had in mind when they called upon the Employer.

It is the position of the Employer that he is not subject to the jurisdiction of the National Labor Relations Board. If the contrary is ultimately determined to be the final result, then his position is best summed up in the words of the Honorable Abe Murdock, who in dissenting in part said:

> "It is axiomatic that a refusal, particularly an employer's refusal to recognize and bargain with a Union, must be preceded by a specific request. The Board has heretofore characterized such a request as 'a clear and unequivocal demand for recognition.' " (Citing the *Solomon Company,* 84 NLRB 26 and *NLRB v. Valley Broadcasting* Company, 28 LRRM 2148.)

> "An examination of the facts in the instant case reveals, as the majority concedes, no evidence that the Union at any time specifically requested the respondent to recognize it as the majority bargaining representative of his employees. Moreover there is no evidence that the Union representatives, who met twice with the respondent, informed him that they were authorized by a majority of his employees to bargain on their behalf. Rather, it is apparent from the very testimony of the Union agent, Gamble, that on

October 3, 1950, the Union claimed only 'over 30% of the membership signed up.' The majority, however, are satisfied with Gamble's conversation with respondent on October 3, 1950, together with the language of the general recognition clause contained in the 'Master Agreement' which the Union had left with the representative to 'study', constitute a sufficient request and claim to majority representative status. But the evidence, according to the credited testimony of the Union's representative, reveals merely that the Respondent was put on notice that the Union was organizing his plant and was requesting him to agree to a consent election. It was in this context that Gamble, the Union agent, left the blank contracts with Respondent, expressing sympathy for the Respondent's anti-union position and requesting that the Respondent did not know 'too much about the principles and policies of the organization.' " (Tr. p. 48 to p. 50.)

In footnote 12 Mr. Murdock says:

"Although I agree with the Trial Examiner's findings that the Union made no claim to majority status, I cannot agree with its further finding that to do so would have been 'futile'. The record will not support a conclusion that the Respondent had demonstrated an inflexible determination to have no dealings with the Union. Indeed, he accepted the contract, read it, and subsequently told Gamble he thought it was 'a good contract.' Under these circumstances, it was incumbent upon the Union to speak up and state its claim to a majority and make a request to

negotiate a contract so providing, if it was actually requesting anything more than a consent election agreement." (Tr. p. 50.)

Mr. Murdock proceeds further in his Opinion:

"The majority stress the Respondent's testimony that he interpreted the remarks of Gamble as an attempt to negotiate. But words in the mouths of inexpert witnesses are not words of art. It is clear that Gamble wanted to negotiate a consent election agreement. It is not clear, and I do not think the Board should so hold, that the Union was also requesting immediate recognition as the bargaining representative of the Respondent's employees." (Tr. p. 50.)

Then in footnote 13 Mr. Murdock says:

"I cannot agree with the majority that the Respondent's use of the word 'negotiate' in his testimony means 'collective bargaining.' Gamble's testimony, which the Respondent agreed was accurate, and which the Trial Examiner credits, reveals that Gamble said: 'I asked him (Zall) if he would consent to an election if we had over thirty per cent'. The Respondent asked to see the authorization cards and Gamble refused. It was then, according to Gamble's credited testimony, that the Respondent said: 'Go ahead and have your election.' I interpret the testimony of the Respondent, cited in footnote 7 of the majority's opinion, to be in accord with Gamble's version of the conversation between them." (Tr. p. 50.)

Mr. Murdock completes hin Opinion and says:

"While I fully agree withe the majority that the Respondent's conduct following his conversation with Gamble on October 3, 1950, was in violation of the rights of his employees under the Act, I do not believe that such conduct may properly be substituted for the requirement that a union must clearly and affirmatively make known to an employer that it is the majority bargaining representative of his employees and desires immediate recognition for the purposes of collective bargaining. In my opinion, this requirement is a condition precedent to a finding that an employer had refused to bargain with a labor organization.

"Accordingly, I would dismiss the allegation in the complaint that the Respondent has refused to bargain within the meaning of Section 8(a)(5) of the Act." (Tr. p. 50 to p. 51.)

CONCLUSION.

We respectfully submit that the petition of the Employer should be granted and that of the Board denied.

The Employer was not within the jurisdiction of the Board and in any event was not faced with a clear-cut demand to bargain.

If jurisdiction is to be assumed and the Board's decision affirmed the Employer will be required to bargain with the Union.

As a practical matter, we wish to inform the Court that only two of the employees mentioned are still with the Employer. Should the decision of the *Valley Broadcasting* case be followed and no violation of Sec. 8(a)(5) be found and the Union continue to maintain its position that it is the bargaining agency, either party then might petition for certification and should the Union prevail in an election, the parties would approach the conference table in full realization of their respective positions and in what we feel would be mutual confidence.

Dated, Marysville, California,
April 28, 1952.

Respectfully submitted,
RICH, CARLIN & FUIDGE,
Attorneys for Petitioner,
Sam Zall.

(Appendix "A" Follows.)

Appendix A.

Appendix "A"

National Labor Relations Board v. Valley Broadcasting Company, 189 Fed. (2d) 582. (Sixth Circuit, June 1, 1951.)

The petitioner prayed enforcement of its order requiring the respondent, the owner and operator of a radio station at Steubenville, Ohio, to cease and desist from refusing to bargain with a certain union as the exclusive representative of its announcers and to refrain from interfering with its employees in the exercise of their rights of self-organization and to take specified affirmative action.

Respondent was admittedly engaged in interstate commerce. Laux was its General Manager; Troesch, his assistant. Hirsch, the union representative, held meetings with the announcers with the result that seven signed applications for membership. In addition, the announcers personally requested the union representative to proceed at once to bargain.

From his office some forty miles away Hirsch phoned Laux the next day but the latter being away, talked to Troesch, informing him he was a representative of the Union, that the announcers had signed the application blanks, that the Union had been designated bargaining representative, and that unless the respondent recognized the Union it would file a petition for certification.

Upon being asked categorically if he would recognize the Union, Troesch answered that he would not. The Union filed a petition for certification but later withdrew it.

About a week later at a meeting of the announcers and at a time when both Laux and Troesch knew the announcers had signed the applications Troesch brought out a contract which the respondent had with its engineers and said that the engineers were pleased with it "and that he would like to do the same for us"; "that it was a good contract; and it gave us security over a period of three years" and that "if that contract looked acceptable to us, we would have one made on a similar structure, including periodic raising and hiring and firing clauses to be included".

One of the announcers asked Troesch, "Why are we going through looking at any other kind of a contract when we have these A.F.R.A. application blanks and all those who were present have signed and we are interested in becoming members of the organization?"; to which Troesch replied, "Why should we call in an outsider?"; he said, "We are one small family and we can handle our own problems without calling in someone else".

Further conversation occurred between Troesch and the announcers concerning their membership in the Union and Troesch said he would agree to any kind of an agreement except an A.F.R.A. agreement.

After the designation of the Union as the agent of the announcers their pay scale was raised 10¢ an hour. Thereafter Troesch offered them a contract setting out new wage schedules with certain beneficial improvements and while the contracts were not signed, they were accepted and the Union plans abandoned. One of the announcers then wrote the Union a letter advising that they no longer wished to be represented by the Union.

Some months later, at a conference between Hirsch, Laux, Troesch and Berkman, President of the Respondent, Hirsch renewed his request for recognition, which was definitely refused.

The Court says:

> "Such in substance are the evidential facts found by the trial examiner and confirmed by the Board. The Board found that the conduct of Respondent through its agents, Laux and Troesch constituted a violation of Sec. 8 (a) (1) of the Act and we concur * * *" (Page 585.)
>
> "After a careful examination of the record we are unable to say that there was substantial evidence that the Union through Hirsch ever presented respondent with a clear demand to bargain. On this point we agree with the dissenting member of the Labor Board, Mr. Murdock, * * *" (Page 586.)
>
> "Finally, our conclusion is that insofar as petitioner seeks to establish a violation of Section 8 (a) (5), its petition is dismissed, but in all other respects a judgment will be entered."